Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-23–09 OF 2012(W)
HASHIM YUSOFF, SURIYADI, AHMAD MAAROP, ZAINUN ALI AND JEFFREY TAN FCJJ
17 OCTOBER 2013

Revenue Law — Income tax — Withholding tax — Private company resident in Malaysia carrying out activities of owning vessels, hiring and managing vessels with third party charterers — Respondent entered Uniform Time Charter Parry for Offshore Service Vessels contracts with non-resident companies — Respondent made full payment without deduction of withholding tax — Statutory deduction — Requirement to withhold tax payment of charter fees to non-resident companies — Whether time charter payment made to non-resident companies subject to withholding tax — Income Tax Act 1967 s 109B

The respondent was a private company resident in Malaysia, with its main activities being the owning of vessels, hiring and managing vessels with third party charterers. The respondent had entered into 'Uniform Time Charter Parry for Offshore Service Vessels' contracts ('UTC') with non-resident companies particularly from Singapore, which hired out vessels, services and crews to the respondent. In consideration, payments were made to them under the UTC contracts. Believing that the non-resident companies were in receipt of business income and being only subjected to Singaporean laws, the respondent made full payment without any deduction of withholding tax under s 109B of the Income Tax Act 1967 ('the Act'). The said section provided for the statutory deduction from payments made to non-residents for services rendered. In order to have the respondent listed with Bursa Malaysia, the respondent's technical adviser applied for a private ruling from the appellant's technical department regarding the payments made to non-resident companies without any deduction of tax. The appellant informed the respondent that pursuant to s 109B of the Act, the latter was required to withhold tax payment of charter fees made by it to the non-resident companies. Dissatisfied, the respondent filed for a judicial review at the High Court to have the appellant's decision quashed by way of certiorari. The application was unsuccessful and an appeal at the Court of Appeal proved futile. Hence, the present appeal. The issue that arose for the court's adjudication in this appeal was whether the time charter payment made by a resident company in Malaysia to non-resident companies in Singapore was subject to withholding tax under sub-s 109B(1) of the Act read together with sub-s 4A(iii) and s 24(8) of the same Act and therefore, whether such non-resident companies were entitled for relief under

art IV of the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Malaysia-Singapore) ('the DTA').

Held, allowing the appeal with costs:

(1) With the introduction of s 4A(iii) of the Act, read together with articles II and VI of the DTA, the Government of Malaysia might tax a non-resident company's income, categorised as special classes of income, without the previous fear of the specter of a permanent establishment having been established in Malaysia. In the course of construing the relevant provisions of the Act and DTA, nothing unjust or absurd in the purpose of Parliament was found (see para 33).

(2) The respondent had made payments to non-resident companies in respect of vessels and crews hired under the UTC contracts, with the income received by the non-resident companies as special classes of income. As it was the intention of Parliament to tax non-resident companies from Singapore in the circumstances of the case, and with article IV being inapplicable to income received under s 4A(iii) of the Act, the payments received by the non-residents were therefore taxable. It was thus incorrect on the part of the High Court and the Court of Appeal to take the simplistic approach of considering art IV in isolation, giving undue significance to the existence or non-existence of a permanent establishment. The intention of Parliament to collect tax from non-residents who have received payments from Malaysians, would be rendered ineffective unless associated provisions were also promulgated to allow the collection of tax at source. That tax collected at source might be referred to as withholding tax, with the associated provision in the Act for collection being s 109B of the Act (see paras 34–35).

(3) As the non-resident companies in this appeal were taxable, s 109B of the Act was triggered, and the respondent was forthwith statutorily bound to withhold a portion of the payments as tax. This provision is a tax collection mechanism primarily to ensure collection of the tax due from any person liable to make payments to a non-resident person or companies. In this appeal, the two pre-conditions do exist viz the respondent was liable to make payments, and the payment was to a non-resident for the use of moveable property (see para 36).

[Bahasa Malaysia summary

Responden merupakan syarikat persendirian yang bermastautin di Malaysia, yang mana aktiviti-aktiviti utamanya adalah memiliki kapal-kapal, menyewa dan mengurus kapal-kapal dengan pencarter-pencarter pihak ketiga. Responden telah memasuki kontrak-kontrak 'Uniform Time Charter Parry for Offshore Service Vessels' ('UTC') dengan syarikat-syarikat bukan pemastautin

khususnya daripada Singapura, yang telah menyewa kapal-kapal, perkhidmatan dan anak kapal kepada responden. Sebagai balasan, bayaran telah dibuat kepada mereka di bawah kontrak-kontrak UTC. Dengan mempercayai bahawa syarikat-syarikat bukan pemastautin telah menerima pendapatan perniagaan dan hanya tertakluk kepada undang-undang Singapura, responden telah membuat bayaran penuh tanpa apa-apa potongan cukai pegangan di bawah s 109B Akta Cukai Pendapatan 1967 ('Akta tersebut'). Seksyen tersebut memperuntukkan potongan statutori daripada bayaran yang dibuat kepada orang yang bukan pemastautin untuk perkhidmatan yang diberikan. Bagi tujuan responden disenaraikan dengan Bursa Malaysia, penasihat teknikal responden telah memohon untuk ketetapan peribadi daripada jabatan teknikal perayu berhubung bayaran-bayaran yang dibuat kepada syarikat-syarikat bukan pemastautin tanpa apa-apa potongan cukai. Perayu telah memberitahu responden bahawa menurut s 109B Akta tersebut responden dikehendaki memegang bayaran cukai untuk fi carter yang dibuat oleh syarikat-syarikat bukan pemastautin itu. Berasa tidak puas hati, responden telah memfailkan semakan kehakiman di Mahkamah Tinggi agar keputusan perayu dibatalkan melalui certiorari. Permohonan itu tidak berjaya dan rayuan kepada Mahkamah Rayuan terbukti sia-sia. Justeru, rayuan ini. Isu yang ditimbulkan untuk pengadilan mahkamah dalam rayuan ini adalah sama ada pada masa bayaran carter dibuat oleh syarikat pemastautin di Malaysia kepada syarikat-syarikat bukan pemastautin di Singapura tertakluk kepada cukai pegangan di bawah sub-s 109B(1) Akta tersebut dibaca bersama sub-s 4A(iii) dan s 24(8) Akta sama dan oleh itu, sama ada syarikat-syarikat bukan pemastautin berhak mendapat relief di bawah perkara IV kepada Perjanjian untuk Mengelak Cukai Berganda dan Pencegahan daripada Mengelak Fiskal berkaitan Cukai atas Pendapatan (Malaysia-Singapura) ('MCB').

Diputuskan, membenarkan rayuan dengan kos:

(1) Dengan pengenalan s 4A(iii) Akta tersebut, dibaca bersama perkara-perkara II dan VI MCB, Kerajaan Malaysia mungkin mengenakan cukai ke atas pendapatan syarikat bukan pemastautin, yang dikategorikan sebagai pendapatan kelas-kelas khas, tanpa berasa bimbang seperti sebelum ini tentang kesalahan dalam suatu pertubuhan tetap yang telah diwujudkan di Malaysia. Semasa mentafsirkan peruntukan yang berkaitan dalam Akta tersebut dan MCB, tiada apa yang didapati tidak adil atau tidak masuk akal dalam tujuan Parlimen (lihat perenggan 33).

(2) Responden telah membuat bayaran kepada syarikat-syarikat bukan pemastautin berkaitan kapal-kapal dan anak-anak kapal yang diambil bekerja di bawah kontrak-kontrak UTC, dengan pendapatan diterima oleh syarikat-syarikat bukan pemastautin sebagai pendapatan kelas-kelas khas. Oleh kerana adalah niat Parlimen untuk mengenakan cukai ke atas

syarikat-syarikat bukan pemastautin daripada Singapura dalam keadaan kes ini, dan di mana perkara IV adalah tidak terpakai terhadap pendapatan yang diterima di bawah s 4A(iii) Akta tersebut, bayaran-bayaran yang diterima oleh mereka yang bukan pemastautin dengan itu boleh dikenakan cukai. Oleh demikian adalah tidak wajar di pihak Mahkamah Tinggi dan Mahkamah Rayuan untuk mengambil pendekatan mudah dalam mempertimbangkan perkara IV secara berasingan, tanpa memberi kepentingan yang tidak wajar kepada pertubuhan tetap yang wujud atau tidak wujud. Niat Parlimen untuk mengutip cukai daripada mereka yang bukan pemastautin yang telah menerima bayaran-bayaran daripada rakyat Malaysia, akan menjadi tidak berkesan kecuali peruntukan-peruntukan berkaitan juga digubal begi membenarkan kutipan cukai pada sumbernya. Cukai yang dikutip pada sumbernya boleh dirujuk sebagai cukai pegangan, dengan peruntukan berkaitan dalam Akta tersebut untuk kutipan sebagaimana di bawah s 109B Akta tersebut (lihat perenggan 34–35).

(3) Oleh kerana syarikat-syarikat bukan pemastautin dalam rayuan ini boleh dikenakan cukai, s 109B Akta tersebut terpakai, dan responden adalah terikat secara statutori untuk memegang sebahagian daripada bayaran sebagai cukai. Peruntukan ini adalah mekanisme kutipan cukai terutamanya untuk memastikan kutipan cukai yang kena dibayar daripada mana-mana orang yang bertanggungjawab untuk membuat bayaran kepada orang atau syarikat bukan pemastautin. Dalam rayuan ini, dua pra-syarat memang wujud iaitu responden bertanggungjawab untuk membuat bayaran, dan bayaran itu adalah kepada bukan pemastautin untuk kegunaan hartanah boleh alih (lihat perenggan 36).]

Notes

For cases on witholding tax, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2759–2760.

Cases referred to

Attorney-General v Carlton Bank [1899] 2 QB 158, QBD (refd)
A-G (Canada) v Hallet and Carey Ltd [1952] AC 427, PC (refd)
Cheatley v The Queen (1972) 127 CLR 291 (refd)
Director-General of Inland Revenue v Euromedical Industries Ltd [1983] CLJ (Rep) 128, FC (refd)
Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2005] 4 CLJ 810, CA (refd)
Geoffrey Robertson QC, Re [2001] 4 MLJ 257; [2001] 4 CLJ 317, CA (refd)
Farrell and another v Alexander [1977] AC 59, HL (refd)
Hatton v Beanmont [1977] 2 NSWLR 211 (refd)
Hock Heng Company Sdn Berhad v Director-General of Inland Revenue [1979] 2 MLJ 51, PC (refd)

Kamla Devi v Takhatmal AIR 1964 SC 859, SC (refd)
Luke v IRC [1963] AC 557,HL (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd and another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)
Pepper (Inspector of Taxes) v Hart [1993] AC 59, HL (refd)
W T Ramsay Ltd v Inland Revenue Commissioners; Eilbeck (Inspector of Taxes) v Rawling [1982] AC 300, HL (refd)
Walter Wright (Singapore) Pte Ltd v Director General of Inland Revenue [1990] 3 MLJ 186, HC (refd)

Legislation referred to

Double Taxation Relief (Singapore) Order 1968
Income Tax Act 1967 ss 3, 4, 4A, 4A(iii), 15B, 24(8), 109B, 109B(1), 132
Interpretation Acts 1948 and 1967 s 17A
Rules of the High Court 1980 O 53

Appeal from: Civil Appeal No W-01–268 of 2010 (Court of Appeal, Putrajaya)

Hazlina bt Hussain (Ahmad Khairuddin bin Abdullah, Normareza bt Mat Rejab and Arsyad bin Hasanuddin with her) (Legal Advisor, Inland Revenue Board of Malaysia) for the appellant.
Thilakan Ramalingam (Thilakan & Co) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] Lembaga Hasil Dalam Negeri Malaysia ie the appellant made a decision vide a letter dated 21 May 2007 stating that pursuant to s 109B of the Income Tax Act 1967 ('the Act'), the respondent was required to withhold tax on payment of charter fees made by it to non-resident companies, which had no permanent establishment in Malaysia. Being dissatisfied with that decision the respondent filed at the High Court of Malaya for a judicial review to have that decision quashed by certiorari. It was successful, and the appellant being dissatisfied filed an appeal at the Court of Appeal but failed. The appellant then filed a successful leave application before us on the following question:

> Whether the time charter payment made by a resident company in Malaysia to non-resident companies in Singapore is subject to withholding tax under sub-s 109B(1) of the Income Tax Act 1967 ('the Act') read together with sub-s 4A(iii) and s 24(8) of the Act and therefore, such non-resident companies are not entitled for relief under articles IV of the Agreement For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Malaysia-Singapore) ('DTA').

BACKGROUND FACTS

[2] The respondent is a private company resident in Malaysia, with its main activity being the owning of vessels, hiring and managing vessels with third parry charterers eg Petroliam Nasional Bhd. In the year of 1998 up to 2004 (the said period), being the period of the matter of the application for certiorari granted by the High Court, the respondent entered into 'Uniform Time Charter Parry for Offshore Service Vessels' contracts (UTC) with non-resident companies particularly from Singapore. These non-resident companies hired out vessels, services and crews to the respondent, and in consideration payments were made to them under the said UTC contracts. In the belief that these non-resident companies were in receipt of business income and being only subjected to Singapore laws (and covered by the avoidance of double taxation treaties), the respondent made full payment without any deduction of withholding tax under s 109B of the Act. This section provides for the statutory deduction of tax from payments made to non-residents for services rendered (the provision will be reproduced later when we discuss the question for our determination in depth).

[3] There are certain indisputable facts in this appeal, amongst them being the want of dispute as to the status of the non-resident companies, the non-resident companies being from countries that have entered into double taxation treaties with Malaysia and having no permanent establishments in Malaysia (with the majority being from Singapore ie 17 out of 22 companies). Further, parties are on common ground that the payments received by the non-resident companies from the respondent were charter fees for the time charter of ships and crews, and received as income by the non-resident companies. The tax to be withheld by the respondent was not that of the respondent's but of the recipient non-resident companies. It is indisputable that the High Court and the Court of Appeal concluded that the income of the non-resident companies derived from the charter hire of vessels and crew contracts was business income.

[4] We now touch on the antecedents which led to this appeal. Being desirous of listing the respondent company with Bursa Malaysia, and to avoid hiccups and pitfalls later, the respondent's technical adviser on 16 May 2005 applied for a private ruling from the appellant's Technical Department regarding the payments made to non-resident companies without any deduction of tax. The respondent simply wanted to know whether it had acted correctly. Vide letter dated 7 July 2005, the appellant's technical department supplied its opinion namely, ie in the circumstances of the case, the charter fees payments were subject to withholding tax. The reply (exh AM-6) in clear terms stated as follows:

> 2. Stta maklum selepas meneliti hujah-hujah yang dikemukakan oleh tuan,

Bahagian ini berpendapat bayaran 'charter fees' kepada syarikat-syarikat tidak bermastautin adalah pendapatan kelas khas di bawah subseksyen 4a (iii) ACP. Oleh yang demikian bayaran ini adalah tertakluk kepada cukai pegangan di bawah seksyen 109B.

[5] On 16 August 2005 the respondent's solicitor brought up the matter again, and submitted a request to the appellant for a decision on the withholding of such tax. On 21 May 2007 the appellant reiterated its stand as per the earlier letter dated 7 July 2005, in that pursuant to s 109B of the Act, the respondent was required to withhold tax on the payment of charter fees made by the respondent for the said period to non-resident companies operating the business of supplying ships, crew or time charter of ships and crew (time charter services). It was the submission of the appellant that as those payments were a *special class of income* under s 4A(iii) of the Act the avoidance of double taxation agreement (DTA) afforded no relief to the respondent.

[6] Dissatisfied with the appellant' reply, the respondent filed an application at the High Court under O 53 of the Rules of the High Court 1980 to quash the appellant's decision, on the basis that the charter fees paid by the respondent were 'business income' of non-resident companies. Without a permanent establishment having been set up by the non-resident companies, the appellant could not tax such income hence relieving the respondent of the duty of withholding the tax on their behalf.

A The appellant's position at all levels

[7] The appellant held the simplistic view that the payments for the charter fees were a *special class of income* under s 4A(iii) of the Act and thus subject to withholding tax under s 109B(1) of the Act. It further canvassed that the generic tax relief provided for in article IV of the DTA as relied upon by the respondent was not to be read in isolation but read together with, and in the context of articles VI, VII, VIII and XV of the DTA. Admittedly, article IV does provide that in each of the countries in which these non-resident companies carry on business, tax may only be imposed on such income in the respective countries where they actually reside, so long as they do not have a permanent establishment in Malaysia. On the other hand Article VI of the DTA stipulates that *notwithstanding the provisions of Article IV … the income or profits of an enterprise of one of the contracting states from the operation of ships … in international traffic may be taxed in the other contracting state only if such income or profits are derived from that other state …* In short article VI expresses that income from the operation of ships could be the subject of tax if derived from Malaysia. Regardless of the instruction under the latter article, under article XVIII of the DTA the Act still governs the taxation of income derived from Malaysia. It reads as follows:

Article XVIII

The laws of Malaysia shall continue to govern the taxation of income derived from Malaysia except where express provision to the contrary is made in this Agreement. The laws of Singapore shall continue to govern the taxation of income arising in Singapore except where express provision to the contrary is made in this Agreement. Where income is subject to tax in both Contracting States, relief from double taxation shall be given in accordance with the following paragraphs of this Article, (Emphasis added.) …

[8] The appellant ventilated that s 4A(iii) of the Act, which took effect from 30 December 1983, was amended specifically to cover situations such as the instant case, where it provides that *rents or other payments made under any agreement or arrangement for the use of any moveable property is deemed to be derived from Malaysia under s 15B of the Act and therefore subject to withholding tax (of the non-resident companies) under s 109B of the Act*. Further, the appellant averred that such rental income was not business income pursuant to s 24(8) of the Act. For completeness we reproduce the latter sub-section which reads as follows:

24 Basic period to which gross income from a business is related

(1) …

(2) …

(3) …

(4) …

(5) …

(6) …

(7) …

(8) This section shall not apply to income under section 4A.

B The respondent's position at all levels

[9] The respondent's stand was as follows. Resident companies which engaged non-resident companies on a time-charter basis were not obliged to withhold any taxes from payments of the charter fees. The basis of this position was that the non-resident companies received payment from the respondent as 'business income' through 'cross-border activities'. The respondent ventilated that under article IV of the DTA, in each of the countries in which these non-resident companies carried on business, tax may only be imposed on such income in the respective countries where these non-resident companies actually reside, so long as these non-resident companies do not have any permanent establishment in Malaysia. The rationale was that by not having a

permanent establishment in Malaysia, these non-resident companies were not regarded as participating in the economic life of Malaysia, thus falling outside the Malaysian taxing jurisdiction.

THE HIGH COURT'S DECISION

[10] The High Court quashed the appellant's decision and in doing so, inter alia adjudged that the maintenance of a permanent establishment in Malaysia was a key factor in deciding whether the income or profits of the Singapore enterprise was to be taxable or not in Malaysia. It said:

> … following the case of Hock Hena Company Sdn Bhd v DGIR, the test to be applied is whether or not the Singapore non-resident enterprise maintains a permanent establishment in Malaysia. Once it is established that the Singapore enterprise does not maintain a permanent establishment in Malaysia, which the (LHDN) concedes, then the income or profits of the Singapore enterprise shall not be taxable in Malaysia … if (the non-resident companies) do not carry on business through a permanent establishment in Malaysia, then by virtue of s 132 of the Act, such (companies) are afforded protection from taxation under Article W and its income or profits 'shall not be taxable in Malaysia … the (LHDN) concedes that the non-resident companies do not have a permanent establishment in Malaysia … hence Article IV of the DTA afforded relief from taxation to these companies … I am of the view that the [LHDN] has misconstrued Article W and had thereby committed error of law.

[11] As said above, being dissatisfied with the High Court's decision, the appellant filled an appeal at the Court of Appeal.

THE COURT OF APPEAL'S DECISION

[12] The Court of Appeal affirmed the High Court's decision and in the course of doing so also opined that the Privy Council's case of *Hock Heng Company Sdn Berhad v Director-General of Inland Revenue* [1979] 2 MLJ 51 supported the respondent's position. The Court of Appeal stated that as the non-resident companies did not have any permanent establishment in Malaysia, relief from taxation was afforded to them, and under Article IV of the DTA the respondent was relieved of any responsibility to withhold anything. It also opined that the provisions of these treaties took precedence over the Act.

OUR ANALYSIS

[13] The matter before us depends very much on the interpretation of the Act and the international treaties that Malaysia has entered into with other countries. With the onus being on the appellant to prove that the non-resident companies are subject to tax, this hurdle must be overcomed first. The first step

to be undertaken is the scrutiny of the Act. The scrutiny must be carried out fairly and when convinced of the clarity of the provision (read together with the facts before us), a decision then follows. In short, effect is given to the clear terms; if he falls under the Act then he must be taxed. Otherwise he is freed of any tax (*Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428; [2005] 4 CLJ 810). To quote the historical and oft-quoted Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioner* (12 TC 358):

> There is no room for any intendment, there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing; but you look fairly at what is said and what is said clearly that is the tax.

[14] In gist, when interpreting provisions in a taxing Act the intention of Parliament must be construed from the language used and for the court to interpret it accordingly (*Cheatley v The Queen* (1972) 127 CLR 291; *A-G (Canada) v Hallet and Carey Ltd* [1952] AC 427; Glaisdale in *Farrell and another v Alexander* [1978] AC 59; *Hatton v Beanmont* [1977] 2 NSWLR 211). The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning. In *Kamla Devi v Takhatmal* AIR 1964 SC 859 the court remarked:

> If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

[15] On the other hand if the words are not so explicit, then it is incumbent upon the court to undertake an exercise to seek out the purpose of Parliament, but without sacrificing justice or importing the absurd. The purposive approach is not a new concept as way back in *Attorney General v Carlton Bank* [1899] 2 QB 158 Lord Russel of Killowen CJ shot a salvo when he stated that all Acts ought to be construed no differently, *whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the Legislature.*

[16] Then came the *Ramsey* principle. Without the need to delve deeply into the history of changes in the attitude of courts (in the like of *Luke v IRC* [1963] AC 557) in the interpretation of taxing Acts, Lord Wilberforce in *WT Ramsay Ltd v Inland Revenue Commission* [1982] AC 300, had occasion to enunciate:

> A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act … What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded …

[17] The above approach was again tested in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. The above shift in approach by British courts ie to take into consideration the purpose of an Act, is in consonant with our s 17A of the Interpretation Acts 1948 and 1967, effective on 25 July 1997, which reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[18] In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97; [2004] 2 CLJ 265 Gopal Sri Ram JCA (as he then was) had occasion to state:

> When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process the court is under a duty to adopt an approach that produces neither injustice nor absurdity, ie, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein (Emphasis added).

[19] In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd and another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, Steve Shim CJSS when discussing s 17A of the Interpretation Acts 1948 and 1967, enjoined the purposive approach to statutory interpretation, in that it equally applied to taxing statutes. His Lordship in no uncertain terms said:

> The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of Legislature.

[20] After tracing the history of how courts treat the interpretation of taxing Acts, culminating with the promulgation of s 17A of the 1948 and 1967 Interpretation Acts and subsequent cases, the purposive approach is here to stay. The intention of Parliament therefore cannot be discounted even if the matter in the Act pertained to taxing issues.

NATURE OF INCOME

[21] So, are the non-resident companies subject to Malaysian tax in the circumstances of the case? In order to decide whether they are subject to tax in Malaysia, which inevitably depends on whether they fall within the letter of the Act as discussed above, a need arises to consider whether their income falls under the heading of business income or as *special classes of income* under the Act.

[22] Under s 3 of the Act a person is charged for each year of assessment upon income accrued in or derived from Malaysia or received in Malaysia from outside Malaysia. The classes of income on which tax is chargeable is laid out under s 4 of the Act. This provision reads as follows:

> 4 Classes of income on which tax is chargeable.
>
> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of
>
> (a) gains or profits from a business, for whatever period of time carried on;
>
> (b) gains or profits from an employment;
>
> (c) dividends, interest or discounts;
>
> (d) rents, royalties or premium;
>
> (e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs; and
>
> (f) gains or profits not falling under any of the foregoing paragraphs.

[23] The above section, which ropes in taxable income from any business, employment and the like, therefore imposes tax even on any non-resident company unless relief is granted by a DTA. Regardless of the prominence of the DTA, we must also not lose sight of the fact that the charging law is the Act, and not the DTA. The DTA is merely the mechanism to eliminate double taxation or to grant relief, and has no jurisdiction as regards the imposition or creation of tax. LC Vohrah J in *Walter Wright (Singapore) Pte Ltd v Director General of Inland Revenue* [1990] 3 MLJ 186 (a case decided prior to the introduction of s 4A of the Act) in crystal clear terms said:

> I agree with counsel for the appellant that the nature of the income has to be determined by the ITA (Income Tax Act) and the law which charges it to tax also has to be the ITA and that only once these factors are established according to the Malaysian domestic law, can the DTA be resorted to in order to determine whether relief is available.

[24] As this appeal relates to cross-border business, a need arises for us to understand the already mentioned DTA ie the Malaysian-Singapore Double Taxation Avoidance Agreement ('the DTA') and the Double Taxation Relief (Singapore) Order 1968, PU518/1968 ('the order'). Prior to the DTA and the order, the incidence of double taxation would befall a taxpayer for the same transaction or income source. With mitigation of grievances and avoidance of double taxation in mind, DTAs and orders were entered into between the Government of Malaysia and other sovereign countries; not only was the incidence of disgruntlement reduced with those countries but the rightful country to impose the tax was determined.

[25] With the signing of DTAs and orders, s 132 of the Act is activated. This section, which, inter alia, deals with matters of double taxation arrangement, reads as follows:

> Double taxation arrangements
>
> 132(1) If the Minister by statutory order declares that —
>
> (a) arrangements specified in the order have been made by the Government with the government of any territory outside Malaysia with a view of affording relief from double taxation in relation to tax under this Act any foreign tax of the territory; and
>
> (b) it is expedient that those arrangements should have effect, then, so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act *notwithstanding anything in any written law*.
>
> (2) …
>
> (3) …
>
> (4) Any arrangements to which effect is given under this section may include —
>
> (a) provision for relief from tax with respect to any person of any particular class;
>
> (b) provision as to income which is not itself subject to double taxation;
>
> (c) provision for exempting from tax any person or any person of any particular class or for exempting from tax (wholly or in part) the income of any person or any person of any particular class; and
>
> (d) in addition to provisions for relief from double taxation, other provisions relating to tax under this Act or to foreign tax of the territory to which the arrangement relate,
>
> and any such arrangements containing any such provision may with respect to that provision be made to have effect for periods before the passing of this Act or before the making of the arrangements, and the foregoing subsections shall be construed accordingly.
>
> (5) …
>
> (6) … (Emphasis added.)

[26] Without the need to restate the positive effect of any DTA, the above provision has prioritised any DTA, and by the order of the relevant Minister, this bilateral treaty takes a pre-eminent position vis-a-vis domestic tax laws (*Director-General of Inland Revenue v Euromedical Industries Ltd* [1983] 2 MLJ 57; [1983] CLJ (Rep) 128, (FC). The legislated words in s 132(1)(b) which read, … notwithstanding anything in any written law' clearly gives the effect of giving precedence over domestic law (In *Re Geoffrey Robertson* [2001] 4 MLJ 257; [2001] 4 CLJ 317).

[27] In order to grant conditional relief to the income falling under s 4 of the Act, article IV as agreed upon in the DTA with Singapore, takes centre stage. It reads as follows:

> *ARTICLE IV*
>
> 1. (a) the income or profits of a Singapore enterprise shall not be taxable unless the enterprise carries on a business in Malaysia through a permanent establishment situated in Malaysia. If the enterprise carries on business as aforesaid, tax may be imposed in Malaysia on the income or profits of the enterprise but only on so much thereof as is derived by that permanent establishment.

[28] It is obvious that non-resident companies would be granted relief but conditional on the said income falling under s 4(a) of the ITA and subject to the non-resident companies establishing the absence of permanent establishment in Malaysia. Effective on 30 December 1983, with the promulgation of s 4A of the Act, the tax landscape changed. This provision, which was legislated by Parliament following the decision in *Director-General of Inland Revenue v Euromedical Industries Ltd* [1983] 2 MLJ 57; [1983] CLJ (Rep) 128, reads:

> 4A Special classes of income on which tax is chargeable
>
> Notwithstanding the provisions of s 4 and subject to this Act, the income of a person not resident in Malaysia for the basis year for a year of assessment in respect of —
>
> (i) …
>
> (ii) …
>
> (iii) rent or other payments made under any agreement or arrangement for the use of any moveable property,
>
> which is derived from Malaysia is chargeable to tax under this Act (Emphasis added).

[29] The above provision has created a *special class of income* whereupon the income of non-residents derived from certain sources, which include rent or other payments made under any agreement or arrangement for the use of moveable property, derived from Malaysia would be chargeable to tax. To put into effect the taxability of rentals from moveable property (though a commonsense reading would suffice to include rentals of vessels under the terminology of 'any moveable property'), in relation to Singapore, article II (Z) in the DTA has cleared any lingering doubt. Under article II, (Z) the terms 'income or profits' be it for Malaysian or Singapore enterprise' do not include, amongst others, income derived from the operation of ships or aircraft, thus neatly sidestepping s 4 of the ITA.

[30] For easy reference we reproduce herewith the relevant portion of article II, which reads:

Article II

In this Agreement, unless the context otherwise requires

(a) …

(l) *The terms income or profits of a Malaysian enterprise and income or profits of a Singapore enterprise do not include* rents or royalties in respect of literacy or artistic copyrights, motions picture films or of tapes for television or broadcasting or of mines, oil wells, quarries or other places of extraction of natural resources or of timber or forest produce, or income in the form of dividend, interest, rents, royalties or fees or other remuneration derived from the management, control or supervision of the trade, business or other activity of another enterprise or concern or remuneration for labour or personal services or *income derived from the operation of ships or aircraft* (Emphasis added.)

[31] Nothing is mentioned in article II (Z) of any relief being granted were there to be any permanent establishment set up in Malaysia by the non-residents for the *special class of income*. This silence is also seen in article VI of the DTA Malaysia/Singapore and in fact silenced by the phrase, *Notwithstanding the provisions …* The above view regarding phrases of this nature equally applies here; article VI therefore takes prominence over article IV, thus entitling the Malaysian government to tax non-resident companies, subject to the given conditions. This article provides as follows:

1. *Notwithstanding the provisions* of Article IV of this Agreement the income or profits of an enterprise of one of the Contracting States from the operation of ships or aircraft in international traffic may be taxed in the other Contracting State only if such income or profits are derived from that other Contracting State … (Emphasis added.)

[32] With the income of the non-residents in the circumstances of the case falling under s 4A (iii) and dealt with differently by the Act and the DTA, article IV is thus inapplicable to the instant facts.

FINDING

[33] With the introduction of s 4A(iii) of the Act, read together with articles II and VI of the DTA, the Government of Malaysia may tax a non-resident company's income, categorised as *special classes of income*, without the previous fear of the specter of a permanent establishment having been established in Malaysia. In the course of construing the relevant provisions of the Act and DTA neither did we find anything unjust or absurd in the purpose of Parliament.

[34] We find that the respondent in this appeal had made payments to

non-resident companies in respect of vessels and crews hired under 'Uniform Time Charter Party for Offshore Service Vessels' contracts, with the income received by the non-resident companies as *special classes of income*. As it was the intention of Parliament to tax non-resident companies from Singapore in the circumstances of the case, and with article IV being inapplicable to income received under s 4A (iii), the payments received by the non-residents were therefore taxable. It was thus incorrect on the part of the High Court and the Court of Appeal to take the simplistic approach of considering article IV in isolation, giving undue significance to the existence or non-existence of a permanent establishment as demanded by *Hock Heng Company Sdn Berhad v Director General Of Inland Revenue* [1979] 2 MLJ 51, and giving no weight to s 4A(iii) of the Act.

[35] Needless to say, the intention of Parliament to collect tax from non-residents who have received payments from Malaysians, would be rendered ineffective unless associated provisions are also promulgated to allow the collection of tax at source. That tax collected at source may be referred to as withholding tax, with the associated provision in the Act for collection being s 109B. This section reads as follows:

> 109B Deductions of tax from special classes of income in certain cases derived from Malaysia.
>
> (1) where any person (in this section referred to as 'the payer') is liable to make payments to a non-resident:
>
> (a) …
>
> (b) …
>
> (c) for rent or other payments made under any agreement or arrangement for the use of any moveable property, which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments …

[36] In the circumstances of the case as the non-resident companies in this appeal are taxable, s 109B of the Act is triggered, and the respondent is forthwith statutorily bound to withhold a portion of the payments as tax. To reiterate, this provision is a tax collection mechanism primarily to ensure collection of the tax due *from any person liable to make payments to a non-resident person* (or non-resident companies in the circumstances of the case) (*The Law and Practice of Singapore Income Tax* by Pok Soy Yoong p 405). In this appeal the two preconditions do exist viz. the respondent is liable to make payments, and the payment is to a non-resident for the use of moveable property.

DECISION

[37] As the income paid to the non-resident companies is subject to tax the answer to the question for our determination is in the positive.

[38] The appeal is allowed with costs. The orders of the High Court and Court of Appeal are set aside. The deposit is refunded.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor